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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: Nebraska Service Center Date: JAN 17 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(A)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Hayward

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(A), as an alien of extraordinary ability in the sciences. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, instead of addressing the director's specific concerns, counsel makes broad procedural and policy arguments that will be addressed below. Nevertheless, in addition to addressing counsel's arguments, we will also review the director's conclusions.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term 'extraordinary ability' means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. 204.5(h)(2). In his decision, the director referenced this regulatory definition. On appeal, counsel asserts that the petitioner was denied due process because the director did not specify exactly the size of the percentage. Counsel argues "the Act (INA) has almost allotted 29% of the visas available to employment based categories, therefore, the Service must be required to show the actual percentage it is referring to when denying [a] visa to a person of extra ordinary [sic] ability so that there is a rational co-relation and a fair decision with Due process and Equal Protection of the law."

[redacted]

Counsel appears to be confusing two unrelated percentages. Congress sets aside a certain percentage of visas for various classifications. Those percentages are unrelated to the regulatory language that restricts aliens seeking classification as an alien of extraordinary ability to those within the small percentage at the top of their fields. The use of the phrase "small percentage who have risen to the top of their field," as part of the definition simply demonstrates the restrictive nature of the classification and is directly derived from the legislative history at H.R. Rep. No. 101-723, pt. 1, 101st Cong., 2d Sess. 59 (1990). It is not an evidentiary standard. Rather, the regulations provide 10 objective criteria, three of which must be met to establish eligibility. Those are the evidentiary standards upon which the director relied in evaluating the petitioner's claim. Had the director, instead of relying on the regulatory criteria, claimed to have ranked every scientist in the field and concluded that the petitioner falls outside an undisclosed percentage, counsel's argument might be more persuasive. But the director did not use such an ambiguous standard. Rather, the director issued a request for additional documentation based on the proper regulatory criteria and, after considering the petitioner's response, issued a final notice of denial explaining the basis of the denial under the correct regulatory standards listed below. As such, we find no denial of due process.

The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the Service regulation at 8 C.F.R. 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a scientist. On appeal, counsel asserts that the Service should be "more liberal in dealing with the professor and researcher category under 20 C.F.R. 656.21a(a)." This Department of Labor regulation is entitled, "Applications for labor certifications for occupations designated for special handling." As this case does not involve a labor certification and is not before the Department of Labor, counsel's point is not entirely clear. It remains, the petitioner is seeking classification under the most restrictive employment-based classification, aliens of extraordinary ability. This classification makes no distinction for professors and researchers.[1] Counsel's remaining argument that educated scientists should be admitted more readily than relatives, refugees and asylees as the latter groups are more likely to be tax burdens is a not relevant consideration. We are bound by the law and the regulations that mandate that aliens of extraordinary ability meet strict evidentiary requirements. The evidentiary requirements for other classifications are not relevant to the adjudication of this petition. Finally, the issue of who might become a tax burden is not a relevant consideration at the petition stage.

The regulation at 8 C.F.R. 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international

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[1] Section 203(b)(1)(B) provides a separate classification for outstanding professors and researchers, but only an employer can file a petition under this classification. The petitioner in this petition has self-petitioned as an alien of extraordinary ability under Section 203(b)(1)(A).

recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. The petitioner has submitted evidence that, he claims, meets the following criteria.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The petitioner submitted evidence that he received the 1994 2nd award from the China Instrument Society. The award itself indicates that this award was a scholarship. In his request for additional documentation, the director requested evidence of the significance of this award. In response, the petitioner submitted a letter from Professor Yetai Fei, former dean of the department of precision instruments where the petitioner was studying in 1992, who asserts that he urged the petitioner to apply for this scholarship and that the petitioner was "the only one who got awarded by [the] China Instrument Society in our university in 1994." Professor Fei further asserts that in 1996 the same project received the 2nd Award for Progress in Science and Technology from the Ministry of Machinery Industry in China. The petitioner submitted the award certificate that was actually issued to Professor Fei; although, in his own letter, the petitioner asserts that he "fulfilled the concrete tasks of the project."

The director concluded that the awards were primarily academic and that the petitioner had not adequately established his own role in the research that won the 1996 award. Counsel does not address this concern on appeal.

We concur with the director. Academic study is not a field of endeavor, but training for a future field of endeavor. As such, awards for academic work, scholarships and fellowships cannot be considered awards in a field of endeavor. Moreover, only students compete for such awards. As the petitioner did not compete with national or international experienced experts in the field, the awards cannot be considered evidence of the petitioner's national or international acclaim.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The record reflects that the petitioner served as a referee for the *Chinese Journal of Lasers* from May 1997 to August 1999, during which time he reviewed six articles. It is noted that the petitioner was a doctoral student at Tsinghua University at the time. Jia Wang, a professor at that university, asserts that the petitioner was invited to be a reviewer for the journal due to his "excellent talents in optical engineering." The petitioner submitted his own statement in response to the director's request for additional documentation as well as another copy of the certification from the journal submitted initially. The petitioner has not, however, submitted documentation from the journal itself explaining how reviewers are chosen.

The director noted that the review process is commonplace in the fields of science and engineering and concluded that the petitioner only "nominally" meets this criterion. We are unclear as to the

director's ultimate conclusion. While evidence relating to a specific criterion must be evaluated as to whether it is indicative of national or international acclaim in order to determine whether a petitioner meets a specific criterion, a petitioner either meets a criterion or he doesn't. Regardless, we share the director's concern that it is common for researchers to review prospective journal articles and, thus, not every reviewer of a journal article has national or international acclaim. As stated above, the petitioner has provided no evidence of how the *Chinese Journal of Lasers* chooses its reviewers or whether reviewing six articles over two years is significant. It is not known, for example, whether the journal sought out the petitioner's advisor at the time, who then assigned the reviewing responsibilities to the petitioner. Thus, we conclude that the petitioner does not meet this criterion.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

The director stated that the petitioner met two criteria, one nominally. A reading of the decision reveals that the director concluded that the petitioner met the authorship criterion discussed below and nominally met the judging criterion as discussed above. Thus, we cannot read the director's statement, "it is clear from the testimony that the petitioner has made important original scientific contributions," as concluding that these contributions rise to a level as to be indicative of national or international acclaim, as opposed to the "international recognition" referenced by the director.

Initially, the petitioner submitted the description section of a patent application filed July 2, 1999 for a laser tracking system. In response to the director's request for additional documentation, the petitioner submitted the patent certification, reflecting that the patent was issued January 30, 2002, a month after the petition was filed. Patents are awarded based on originality, not significance. The petitioner has not demonstrated that his invention had been licensed or otherwise influential at the time of filing.

The petitioner also submitted several reference letters. Dr. Steven Blair, an assistant professor at the University of Utah who supervises the petitioner's postdoctoral research, asserts that the petitioner's background and capabilities make him "uniquely" qualified to work in Dr. Blair's laboratory. Dr. Blair then summarizes the petitioner's work at the University of Utah as follows:

> First, [the petitioner] has been working with electron beam lithography to fabricate metallic nanostructures for the development of enhanced optical materials with the specific properties of large nonlinearity and sensitivity to external stimuli. This work will be presented in the annual American Physical Society (APS) meeting in Indianapolis, 2002. This is the most important international meeting in the physical sciences. Second, based on his expertise developed at [the] Tokyo Institute of Technology, he has developed thin film deposition of dielectric and metallic multilayer structures that have exhibited a record large enhancement of the nonlinear response of the material. This work will be presented at the International Conference on Lasers and Electro-Optics (CLEO) in May of 2002, the seminal conference in optics. Third, he has been developing the nanolithography and

> microfabrication etching techniques for a new class of biosensors that has the ability to detect molecular species (such as DNA and environmental pathogens) with unprecedented sensitivity. This work will be presented at the BiOS meeting at Photonics West in January of 2002. Finally, I plan to establish a collaboration with the Tokyo Institute of Technology in the area of noncrystalline microstructures and MEMS devices to further leverage the unique expertise that [the petitioner] possesses.

As none of the petitioner's accomplishments at the University of Utah had been presented or published as of the date of filing, we cannot conclude that the petitioner had sustained national or international acclaim as a result of these accomplishments at that time. In fact, we note that Dr. Blair's postdoctoral researcher job offer provides that "if you have made sufficient scientific contributions and demonstrated leadership capabilities [by March 2003] I will seek for you the more prestigious appointment of Research Assistant Professor."

Dr. Akira Shimokohbe, former director of the Precision and Intelligence Laboratory at the Tokyo Institute of Technology, discusses the petitioner's work with his group in that laboratory. Dr. Shimokohbe specifically discusses the petitioner's work on thin film metallic glasses and their applications to micro-electrical-mechanical systems (MEMS) as an alternative to crystalline materials, which have disadvantages. Dr. Shimokohbe states:

> [The petitioner] characterized several kinds of thin film metallic glasses and demonstrated the advantages of metallic glasses as micro-actuators and microstructures, which provide an important guide for the practical use of thin film metallic glasses to MEMS. Collaborat[ing] with other members in my group, [the petitioner] fabricated several actuators and devices using TFMG, which could be used in computer pickup systems, the actuation mechanism of micro-robot, micro-motor, etc. I believe this will open up the new application fields in science and industry.

Dr. Shimokohbe concludes that the petitioner's work was presented at conferences in Japan and Switzerland and published in quality journals. Xusheng Wang, who also worked with the petitioner at the Tokyo Institute of Technology, provides similar information, asserting that the petitioner was a "main partner" who "fulfilled the most important part of this project and achieved high quality results." Dr. Kee-Bong Choi, who previously worked with the petitioner at the Tokyo Institute of Technology, reiterates much of the above information and provides general praise of the petitioner's diverse talents and broad knowledge in addition to his ability to speak and write in English and Japanese as well as his native Chinese.

Professor Jacques Jacot, head of the department of microtechnique at the Swiss Federal Institute of Technology, Lausanne, asserts that the petitioner presented his work on thin film metallic glasses at a conference in Switzerland and at Professor Jacot's laboratory. Professor Jacot asserts:

> [The petitioner] demonstrated that as an amorphous material, thin film metallic glasses are suitable as MEMS materials: as the amorphicity, metallic glasses are homogeneous and isotropic so that they are free from size effect; as they are a kind of alloy, so the physical properties of thin film metallic glasses can be adjusted by changing compositions and their contents as well as by precipitation of nanoscale particles; as the glass characteristics, they have viscous flow in the supercooled liquid region (SCLR), which makes them easily micro-formed into 3D structures.

Professor Jacot does not explain how these findings constitute a major contribution to the field. For example, Professor Jacot does not indicate that thin film metallic glasses are now routinely used as MEMS materials due to the petitioner's work.

Dr. Jinweng Liang, the petitioner's doctoral advisor at Tsinghua University, provides general praise of the petitioner's abilities. Regarding his doctoral research, Dr. Liang states:

> [The petitioner] has been diligent, tenacious and creative in his research in the area of dynamic laser tracking and measurement. One of the main difficulties in metrology in the world is to measure the attitude of the moving target in three-dimension space. [The petitioner] fulfilled the complicated laser tracking system based on laser interferometry; he tracked and measured the coordinate of [a] moving object both in 2D and 3D successfully. Compared with the traditionally static metrology, the measuring principles and theory of laser tracking are totally different and complicated. [The petitioner] put forward some constructive methodologies for attitude and dynamic measurement. During his four-year Ph.D. research, he wrote 12 academic papers both in Chinese and English, also he applied [for] a patent about laser tracking to measure the attitude of [a] dynamic target, which could enhance the capabilities of [a] laser tracking system and improve the theory of dynamic metrology theory.

Professor Jia Wang, another professor at Tsinghua University, provides similar information, adding that the petitioner also worked on "External diameter measurement of [a] large generator," a project for the eighth five-year plan. Professor Wang asserts that the petitioner had a good reputation among the other members of the project.

With the exception of Dr. Jacot, the above letters are all from the petitioner's collaborators and immediate colleagues. While such letters are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's national or international acclaim. The record contains little in the way of specific evidence to show what major improvements the petitioner has wrought in his field of endeavor. While the petitioner has published useful research and patented an invention, it can be argued that the petitioner's field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in the field. The record, however, does not establish that the petitioner's work represented a groundbreaking advance in optics, or has far-reaching implications. While the petitioner's research clearly has practical applications, it can be argued

that any Ph.D. thesis or published article, in order to be accepted or published, must offer new and useful information to the pool of knowledge.

Without additional evidence, we cannot conclude that the petitioner is known beyond his immediate circle of colleagues. Even the opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim. Evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. An individual with sustained national or international acclaim should be able to produce unsolicited materials reflecting that acclaim. As will be discussed below, the record contains no evidence that any of the petitioner's articles have been cited. In light of the above, we concur with the director's implication that the petitioner's contributions to his field are not indicative of national or international acclaim.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The petitioner submitted evidence that he has authored 18 published articles in the form of database search results. In his request for additional documentation, the director requested the initial pages of a representative sample of published articles. In response, the petitioner submitted copies of 21 articles. As stated above, the director concluded that the petitioner had met this criterion. We do not concur. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This report reinforces the Service's position that publication of scholarly articles is not automatically evidence of sustained acclaim; we must consider the research community's reaction to those articles.

The record contains no evidence that independent researchers have cited the petitioner's work. As such, we cannot conclude that the petitioner's publication history is indicative of national or international acclaim.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

Initially, the petitioner asserted that he met this criterion due to his salary of $52,900 as a postdoctoral researcher in Japan. In support of this claim, the petitioner submitted a letter from the head of the accounts section at the Tokyo Institute of Technology confirming that the petitioner received 6,077,775 Japanese Yen from September 1999 through October 2000. In response to the director's request for additional documentation, the petitioner submitted his own letter asserting that

the average monthly salary for a postdoctoral researcher in Japan is between 180,000 Japanese Yen and 300,000 Japanese Yen.

The director concluded that the petitioner had not submitted "objective evidence" of the salaries of postdoctoral researchers in Japan. On appeal, counsel asserts that the director "acknowledges that [the petitioner] has met the standard in all required elements of the law of being a person of distinction and of extraordinary ability . . . except that he does not command a high salary." If counsel is implying that the director concluded that the petitioner met three other criteria but that the petition was not approvable because the petitioner failed to demonstrate a high salary, then counsel misreads the director's decision. As stated above, the director specifically stated that the petitioner only met two of the requisite criteria, whereas a petitioner must meet three to demonstrate eligibility.

Counsel further asserts:

> The Service lacks knowledge of the practices of the Universities in the States of maintaining at par salaries even for their brilliant scholars while in Japan there is a difference in salaries and [the petitioner] was paid monthly salary of 470,000 Japanese Yens [sic] while the average salary for the post doctoral fellows is about 270,000 Japanese Yen, as attached per exhibit 1. Therefore, the Service has failed to consider in a fair and liberal manner the elements leading to the conclusion of a person of extraordinary ability in examining the application of [the petitioner].

Exhibit 1 of the appeal is the petitioner's curriculum vitae. Counsel is correct that the Service lacks knowledge of Japanese salaries. The director acknowledged as much, noting that the petitioner had not submitted evidence of postdoctoral salaries in Japan. It is the petitioner's burden, however, to establish how postdoctoral researchers in Japan are compensated. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Moreover, submitting evidence to support the petitioner's claim of the average postdoctoral salary in Japan would be insufficient. The petitioner would need to establish not only that he earned a higher salary than the average postdoctoral researcher, but that his salary was comparable with highly paid experienced members of his field.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as a scientist to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the petitioner shows talent as a scientist, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.